THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Case No. 2019-CP-001438

Gary Washington, Michele Washington, Carolina Procurement Institute, Inc., Carolina Procurement Center, Gervais Professional Suites, LLC., Wellsfargo Bank, FRU, Haynsworth Snkler Boyd, P.A., Edgefield Holdings, LLC. (Assignee), Liberty Solutions, US Department of Treasury, Fannie MAE and Freddie MAC, First Palmetto Savings Bank, F.S.B. Branch Banking and Trust Company of South Carolina, Palmetto Heath Alliance, State of South Carolina Department of Revenue, Seturas Mortgage Company, Plaintiff,

Of whom Gary Washington, Michele Washington, and Carolina Procurement Institute, Inc. are the Appellants,

v.

South Carolina Community

Appellant,

Bank a.k.a. SCCB, OPTUS Bank, Respondent.

Appellate Case No. 2019-001438,

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

The Appellants filed a Complaint against South Carolina Community Bank on December 11, 2018 and an Amended Complaint against South Carolina Community Bank on December 18, 2018. The Appellee filed a Motion to Dismiss in lieu of Answer on January 10, 2019, and a Memorandum in support thereof on April 11, 2019. The Appellee asserts dismissal of the complaint and amended complaint pursuant to South Carolina Rules of Civil Procedure Rule 12b(6)(failure to state a cause of action) and Rule 12(b)(1)(lack of subject matter jurisdiction). In their Complaint and Amended Complaint, the Appellants alleged extrinsic fraud and fraud upon the

court through the Appellee's deception in asserting in a prior foreclosure action that the Plaintiff's property did not have any equity and was not being adequately protected

STANDARD OF REVIEW

Generally, a ruling on a motion to dismiss under Rule 12(b)(6), SCRCP, must be based solely on the allegations contained in the complaint. Baird v. Charleston County, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999). "Viewing the evidence in favor of the plaintiff, the motion must be granted if facts alleged in the complaint and inferences reasonably deducible therefrom do not entitle the plaintiff to relief on any theory of the case." Jarrell v. Petoseed Co., 331 S.C. 207, 209, 500 S.E.2d 793, 794 (Ct. App. 1998).

FACTS

As alleged in Appellant's Richland County Complaint, South Carolina Community Bank committed Extrinsic Fraud and Fraud upon the Court to obtain 1811 & 1815 Gervais Street, Columbia, SC 29201 property. South Carolina Community Bank knowingly and willingly deceived the United States Bankruptcy Court that equity did not exist in the property and testifying that it was not being adequately protected. The Court accepted the fraudulent claim and removed property for the Automatic Stay in which the plaintiffs were entitled. An accredited appraisal validation expert witness, Mr. Steve Siegler, FRICS, ASA, concurs that the fair market value of the property "greatly exceeded" the balance due on the loan to South Carolina Community Bank. Equity exists on property, yet SCCB chose to deceive the Court in order to foreclose on property. Mr. Steve Siegler's Affidavit of Appraisals Market Value and his credentials in the form of a resume were attached to the Complaint.

ARGUMENTS

An appellate court applies the same standard of review as the trial court when reviewing the dismissal of an action pursuant to Rule 12(b)(6) or Rule 12(c), SCRCP. See Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007) (discussing the standard of review of a motion to dismiss under Rule 12(b)(6), SCRCP); Hambrick v. GMAC Mortg. Corp., 370 S.C. 118, 122, 634 S.E.2d 5, 7 (Ct. App. 2006) (discussing the standard of review of a motion for judgment on the pleadings). A ruling on a Rule 12(b)(6) motion must be based solely on the allegations set forth on the face of the complaint. Toussaint v. Ham, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987). When considering a motion for judgment on the pleadings under Rule 12(c), SCRCP, the court must regard all properly pleaded factual allegations as admitted. Falk v. Sadler, 341 S.C. 281, 286-87, 533 S.E.2d 350, 353 (Ct. App. 2000).

The Appellee's Motion to Dismiss asserted the doctrines of res judicata, collateral estoppel, and laches under Rule 12(b)(6), SCRCP.The trial court's decision on a Rule 12(b)(6) motion should be based solely on the allegations on the face of the complaint. Brown v. Leverette, 291 S.C. 364, 366, 353 S.E.2d 697, 698 (1987)(citing Tele-Communications of Key West v. United States, 757 F. (2d) 1330 (D.C. Cir. 1985); Hill v. Watford, 276 S.C. 344, 278 S.E. (2d) 347 (1981)). If the facts alleged in the complaint and inferences reasonably deduced from the facts would entitle the plaintiff to any relief on any theory of the case, a Rule 12(b)(6) motion should be denied. Id.[emphasis added](citing Milburn v. United States 734 F. (2d) 762 (11th Cir. 1984); Blandon v. Coleman, 285 S.C. 472, 330 S.E. (2d) 298 (1985); and Glass v. Glass, 276 S.C. 625, 281 S.E. (2d) 221 (1981)). See Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007) (discussing the standard of review of a motion to dismiss under Rule

12(b)(6), SCRCP); Hambrick v. GMAC Mortg. Corp., 370 S.C. 118, 122, 634 S.E.2d 5, 7 (Ct. App. 2006) (discussing the standard of review of a motion for judgment on the pleadings).

I. TRIAL COURT ERRED IN GRANTING MOTION TO DISMISS ON THE BASIS OF RES JUDICATA

In this case, the Appellee attached numerous exhibits in its Memorandum in Support of Motion to Dismiss for support of its Motion. The Appellee enclosed numerous pleadings from prior litigation involving the Appellants, in support of its defense of res judicata. However, a Rule 12(b)(6) motion to dismiss is not the appropriate pleading to assert res judicata. In Brown v. Leverette, the Court ruled that the trial court's grounds for granting a Rule 12(b)(6) motion due in part to res judicata was in error because these defenses were not apparent from the face of the complaint. Brown at 367.

In the instant case, the Appellants fraud and extrinsic fraud. As noted by the South Carolina Court of Appeals, "[t]he doctrines of res judicata and collateral estoppel do not bar collateral attack of a judgment based on fraud." Evans v. Gunter, 294 S.C. 525 (Ct. App. 1988). In fact, the United States Supreme Court discussed the doctrine of res judicata as a principle that can put an end to a cause of action, absent fraud. Sea Land Services, Inc. v. Gaudet, 414 U.S. 573, 578-579 94 S. Ct. 806, 39 L. Ed. (2d) 9 (1974). Therefore, the Appellee's argument that res judicata supports a motion to dismiss a cause of action for fraud is not supported by the law of South Carolina or the United States Supreme Court and cannot stand.

Plaintiff's fraud upon the court claim is well-founded and should have survived a motion to dismiss. The attorney for the Bank/Mortgage Company entered an appraisal into the record

in Case No. 2008-CP-40-8887, and represented to the court that the properties at issue were worth $306,000, when in fact, they were worth twice that amount. The undervaluation of these properties led to the automatic stay afforded to their owners, the Washingtons, being lifted and the foreclosure of the properties resuming. Debtors' then-Counsel, Attorney John Davis, was first to present an appraisal of the real property. The court improperly relied on Attorney John Davis's appraisal report and later accepted a report from SCCB's Counsel that was in agreement with the inaccurate appraisal report presented by Attorney John Davis who was later disciplined by the South Carolina Bar due to his conduct in this case.

An attorney licensed in South Carolina can submit an appraisal of real property. This attorney is also held to The Uniform Standards for Professional Appraisal Practice (USPAP), which is incorporated into South Carolina law. Standard 2 for Real Property Appraisal, Reporting requires an appraiser to communicate each analysis, opinion and conclusion in a manner that is not misleading. The substantive content of a report determines its compliance. Standards Rule 2-1 is as follows:

Each written or oral real property appraisal report must:

(a) clearly and accurately set forth the appraisal in a manner that will not be misleading;

(b) contain sufficient information to enable the intended users of the appraisal to understand the report properly; and

(c) clearly and accurately disclose all assumptions, extraordinary assumptions, hypothetical conditions, and limiting conditions used in the assignment.

Since the underlying and subsequent oral appraisal made by the Bank's Attorney was prepared and used in connection with the granting and servicing of credit by a

federally insured financial institution, it is considered a federally-related transaction and it is subject to the myriad reporting requirements contained in but not limited to those encapsulated in the Dodd-Frank Act.

The Bank failed to enter a "qualified appraisal" by a "qualified appraiser" as defined by federal law (U.S. Interagency Appraisal and Evaluation Guidelines (75 FR 77450) / Treasury/IRS Circular 230 Guidelines) in a federally-regulated transaction. In issuing his oral appraisal to the federal court, Attorney John Davis not only issued a defective appraisal pursuant to USPAP / So. Carolina law, but also issued one that was known by the Bank and its attorney to be a material misrepresentation to the federal court.

The Kennedy, Watson, McKinney & Associates, Inc. appraisal of the property as $450,000, dated April 2, 2014, was prepared for South Carolina Community Bank. The Bank knew that its oral appraisal did not reflect the accurate and higher value of the property. Thus, the Plaintiff has brought this cause of action asserting appraisal fraud by the City of Columbia, South Carolina Community Bank and its attorney.

"Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." Judy v. Judy, Op. No. 26987 (S.C. Sup. Ct. filed June 20, 2011) (Shearouse Adv. Sh. No. 20 at 14, 24) (quoting Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999)). If res judicata applies, a litigant is barred from raising any issues which were or might have been adjudicated in the former suit. Id. To establish res judicata, the Appellee must prove three

elements: "(1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit." Id. at 19 (citing Riedman Corp. v. Greenville Steel Structures, Inc., 308 S.C. 467, 419 S.E.2d 217 (1992)).

Without the Washingtons' allegation of extrinsic fraud amounting to fraud on the court, the Bank would be entitled to the defense of res judicata. However, that is not the case.

Intrinsic fraud, is fraud which was presented and considered in the trial. It is fraud which misleads a court in determining issues and induces the court to find for the party perpetrating the fraud. Id. at 81, 579 S.E.2d at 610 (quoting Hilton Head Ctr. of S.C. v. Pub. Serv. Comm'n, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987)). Perjury by a party or a witness, use of forged documents, or failure to disclose documents by a party or witness are examples of intrinsic fraud. Id.; Raby Constr., L.L.P. v. Orr, 358 S.C. 10, 21 n.5, 594 S.E.2d 478, 483 n.5 (2004). However, the subornation of perjury by an attorney and/or the intentional concealment of documents by an attorney are actions which constitute extrinsic fraud amounting to fraud on the court. Chewning, 354 S.C. at 82-84, 579 S.E.2d at 610-11. Any claim of fraud on the court must be accompanied by particularized allegations. Id. at 86, 579 S.E.2d at 613.

Appellees have referred to Appellants' bankruptcies dismissed for failure to file additional schedules and one foreclosure matter in which a default judgment was entered. Appellants filed some matters for the purpose of preventing a short sale to permit them time to seek long-term relief from the foreclosure. Due to the fraud issue that emerged, these judgments have not rendered the Appellants' causes of action in this

case obsolete: default judgments are res judicata in the absence of fraud or collusion. Morris v. Jones, 329 U.S. 545 (1947).

The doctrine of res judicata, does not bar collateral attack of a judgment based on extrinsic fraud. Aaron v. Mahl, 381 S.C. 20 585, 592-593, 674 S.E.2d 482, 486 (2009). The South Carolina Supreme Court reiterated the rule that extrinsic fraud is necessary to set aside a judgment based on fraud in Chewning v. Ford Motor Company, 354 S.C. 72, 80, 579 S.E.2d 605, 610 (2003). The Court explained the difference between intrinsic and extrinsic fraud:

Extrinsic fraud is "fraud that induces a person not to present a case or deprives a person of the opportunity to be heard. Relief is granted for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action."

II. TRIAL COURT ERRED IN GRANTING MOTION TO DISMISS ON THE BASIS OF COLLATERAL ESTOPPEL

Along the same lines as the Appellee's res judicata argument, the Appellee also argues that collateral estoppel supports their Rule 12(b)(6) motion to dismiss. As noted above, the Evans court held that collateral estoppel does not bar the collateral attack of a judgment based on fraud.

In this case, the Appellants argue in their Complaint and Amended Complaint extrinsic fraud and fraud upon the court, matters that are not subject to attack through a Rule 12(b)(6) motion based on res judicata or collateral estoppel.

III. TRIAL COURT ERRED IN GRANTING MOTION TO DISMISS ON THE BASIS OF LACHES

The Appellee asserted the doctrine of laches based on the original date that the foreclosure action was initiated by South Carolina Community Bank. As noted by the South Carolina Court of Appeals, "[t]he determination of whether laches has been established is largely within the discretion of the trial court. Delay alone is not enough to constitute laches; it must be unreasonable, and the party asserting laches must show prejudice." Brown v. Butler, 347 S.C. 259, 265, 554 S.E.2d 431, 434 (Ct. App. 2001)(citing Hallums v. Hallums, 296 S.C. 195, 198-199, 371 S.E.2d 525, 527 (1988). Laches is an equitable doctrine defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." Hallums v. Hallums, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988). In order to establish laches as a defense, a Appellee must show that the complaining party unreasonably delayed its assertion of a right, resulting in prejudice to the Appellee. Kelley v. Kelley, 368 S.C. 602, 606, 629 S.E.2d 388, 391 (Ct. App. 2006). The case law clearly provides that the issue of whether a party is barred by laches from asserting a right is to be determined in light of the facts of each case. See F.Gregorie & Son v. Hamlin, 273 S.C. 412, 257 S.E.2d 699 (1979). Relief for fraud upon the court is not subject to the one year limit placed on relief under Rule 60(b)(3). See H. Lightsey & J. Flanagan, South Carolina Civil Procedure 407 (2d ed. 1985).

In its Memorandum in Support of its Motion to Dismiss, the Appellee merely cited "prejudice" and did not elucidate what prejudice in fact was suffered. Further, with respect to a reasonable amount of time in filing the current Complaint, the Complaint asserts actions after the filing of the foreclosure action on which their causes of action are based, and the date of when the foreclosure action was initiated should not control.

IV. TRIAL COURT ERRED IN GRANTING MOTION TO DISMISS DESPITE APPELLEE'S SUBSTANTIATED FRAUD ALLEGATIONS

a. Fraud on the Court

The Appellee first argues that the Plaintiff does not state sufficient facts to sustain a claim of fraud upon the court. Fraud upon the court requires a showing that one has "acted to deceive or defraud the court." Chewning v. Ford Motor Co., 354 S.C. 72, 78 (2003). As noted by the Appellee, fraud upon the court involves an injustice not only to an individual party, but to the public whom the judicial process is designed to protect. Hazel-Atlas Glass Co. v. Hartford- Empire Co., 322 U.S. 238, 245-246 (1944).

A Rule 12(b)(6) motion, as noted above, deals with the allegations on the face of the complaint, which are to be construed in favor of the plaintiff and liberally so. The Appellants allege that the Appellee knowingly and intentionally deceived the court through actively concealing the fair market value of the foreclosed property at issue and that when this

happens, “everyone suffers” and its a matter of public interest, constituting allegations sufficient to state a cause of action for fraud on the court.

Further, the Appellee alleges “[p]laintiffs do not allege that attorneys for SCCB fabricated evidence or paid bribes to judicial officers in order to successfully foreclose upon the at-issue property” and thus fail to state a sufficient cause of action for fraud upon the court. The Chewning court used these allegations as examples of what could constitute fraud on the court rather than dispositive requirements of allegations of fraud upon the court.

Fraud upon the court is "fraud which . . . subvert[s] the integrity of the Court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." Evans v. Gunter, 294 S.C. 525, 529, 366 S.E.2d 44, 46 (Ct. App. 1988) (emphasis added) (quoting Lightsey & Flanagan, supra, at 408). It has also been defined as "fraud that does, or at least attempts to, defile the court itself . . . ." 12 Moore's Federal Practice § 60.21[4][a] (3d. ed. 2000).

South Carolina law maintains a distinction between intrinsic and extrinsic fraud. Mr. G v. Mrs. G, 320 S.C. 305, 307-08, 465 S.E.2d 101, 102-03 (Ct. App. 1995) (Hearn, J. dissenting). "Intrinsic fraud refers to fraud presented and considered in the judgment assailed, including perjury and forged documents presented at trial." Evans, 294 S.C. at 529, 366 S.E.2d at 46. It is fraud which "goes to the merits of the prior proceeding which the moving party should have guarded against at the time." City of San

Francisco v. Cartagena, 41 Cal. Rptr. 2d 797, 801 (Cal. Ct. App. 1995), quoted with approval in Mr. G, 320 S.C. at 308, 465 S.E.2d at 103.

b. Extrinsic Fraud

"Extrinsic fraud is 'fraud that induces a person not to present a case or deprives a person of the opportunity to be heard.'" Raby Constr., L.L.P. v. Orr, 358 S.C. 10, 19, 594 S.E.2d 478, 483 (2004)(citing Chewning v. Ford Motor Co., 354 S.C. 72, 81(2003)). The Appellees allege that Appellants do not plead "any facts" regarding extrinsic fraud. The Appellants in fact allege that the Appellants did not have an opportunity to be heard regarding the actual equity in their properties because the United States Bankruptcy Trustee did not provide information to the judge regarding the fair market value of the property and that this harmed the Appellants. Debtor Gary Washington was denied the opportunity to be heard on the issue of lifting of the automatic stay as it related to co-owner Michele Washington in his Chapter 13 Bankruptcy Case, Case No. 16-02667-JW:

An Order Granting Motion for Relief From Co-Debtor Stay was entered on July 30, 2018 (Dkt. 146). Debtor Gary Washington, then a pro se litigant, filed a Motion for Reconsideration of Relief From Co-Debtor Stay on August 13, 2018 (Dkt. 152). On August 15, 2018, this Court set a hearing on the Motion to Reconsider Relief at 9:00 am on September 11, 2018 at the Columbia courthouse (Dkt. 153). On September 10, 2018, the Clerk made an entry that the Motion to Appear pro hac vice fee had been paid. The application packet had not been received yet by Attorney

Donna McQueen containing the Motion and Proposed Order with the application approval. Counsel Robinson's application has since been accepted by the Court. Counsel Robinson received a mailed packet containing the receipt for the accepted filing fee. Per Judy Marples, the Pro Hac Vice coordinator, the approved application was mailed to Counsel Donna McQueen with the proposed order for submission to this Bankruptcy Court. However, the application packet containing the Motion and Proposed Order with the application approval was never received by Counsel Donna McQueen. Due to the granting of Edgefield Holding's Motion, the instant case was closed without confirmation of Counsel Robinson as Debtor's Counsel of Record.

McQueen filed a motion to continue the hearing due to the pending status of Robinson's pro hac vice application and needing additional time to subpoena key witnesses for the motion hearing (Dkt.157). Ten days' time was requested to receive the approval packet for the South Carolina Bar Admissions and for issuing subpoenas for the appraisers of property in the case and key to the lifting of the automatic stay. Robinson flew to South Carolina on September 10th in preparation for the hearing scheduled September 11th. Over the course of the weekend and on Monday, North and South Carolina were preparing for Hurricane Florence. South Carolina declared a state of emergency. When Robinson entered Charlotte on a layover, Washington and Robinson learned that evacuations were underway and that the Columbia Court might close.

Counsel Donna McQueen, who resides in Berkeley County learned that the tri-county area of Charleston, Berkeley and Dorchester counties were placed under a mandatory hurricane evacuation.McQueen discovered that one of her homes was in an area under

orders to evacuate. McQueen was also in contact with the other attorneys of record to discover if any were opposed to her Motion to Continue. McQueen also contacted the Clerk regarding filing the motion. The email correspondence was docketed on September 10, 2018 (Dkt. 159-164).

Upon learning that the U.S. Bankruptcy Court of South Carolina posted a notice on the website that the Court was closed from Tuesday, September 11th, Washington assisted Robinson in flying back to Florida. McQueen learned that the hearing would be reset to September 13, 2018 and emailed the Court on September 10, 2018. Due to the state of emergency, the notice posted on the U.S. Bankruptcy Court website, and the initial basis for the request to continue the hearing, McQueen and Washington had reason to believe the hearing would be postponed beyond September 13, 2018. Counsel McQueen was also in contact with the other attorneys of record to discover if any were opposed to her Motion to Continue. Counsel McQueen also contacted the Clerk regarding filing the motion. The email correspondence was docketed on September 10, 2018 (Dkt. 159-164). The evening of Monday, September 10th, a notice was posted to the United States District Court for South Carolina, Bankruptcy Court that the Court would be closed following day and until further notice. Debtor's Motion for Continuance was granted but for two days; the hearing was rescheduled for September 13, 2018. In the motion, Counsel McQueen had noted that Debtor Washington, Robinson, and McQueen were standing by in case the hearing was held as scheduled on September 11th. The South Carolina Bankruptcy Court was closed on September 12, because of the impending hurricane, however Counsel McQueen,

received a telephone notice from the Court Clerk on September 12 indicating that the hearing would proceed on September 13, 2018. Counsel McQueen explained that it was not possible to travel from Berkeley County to Columbia as the mandatory evacuation was underway, the Governor and local officials were pleading with the public to leave without further delay. Counsel and she and her family were seeking safety in the opposite direction of Columbia to avoid the large slow-moving hurricane. Thus, Debtor and Counsel were not present at the rescheduled hearing.

An Order Granting the Request to Continue the Hearing was entered the following day September 11, 2018 containing a new hearing date of September 13, 2018 (Dkt. 158). This date prevented Washington, McQueen, and Robinson from benefiting from the granted extension since there was not sufficient time to receive the approved application packet or arrange for the appearance of witnesses for the hearing. The Court record does not reflect any of the delay anticipated by the court closings and the Order denying the Motion did not address the state of emergency, evacuation zones, court closings, or the potential difficulties any parties might face in appearing on September 13th during the anticipated brunt of the storm.

The hearing was held on September 13, 2018 and Washington, McQueen and Robinson were not present. In spite of the motion for continuance filed by the Debtor three days' prior, Counsel stated to the Judge that no communication had been received regarding Debtor's absence.

An Order granting this Motion was entered on September 20, 2018. Counsel McQueen attempted to file a Motion for Reconsideration of the decision only to have

technical difficulties involving the E-filing system. Pursuant to Mandatory Electronic Filing Requirement for Electronic Filing under Local Rule 5005-4(c), Debtor and Counsel sought relief for the property located at 2917 River Drive, Columbia, SC 29203. Had they received notice, they would have been able to present their points and authorities for reinstating the automatic stay. The Order granting the stay was not based solely on the failure of the Debtor and Counsel to appear. It addressed substantive issues that Debtor and Counsel would have countered, had they 1) received the ten days of requested relief, or 2) received notice that the hearing had been rescheduled two days past its initial date. The basis of the Order entered September 20, 2013 precipitated the closing of the overall case. Debtor Washington and Counselors request fifteen days to subpoena witnesses for a rehearing of the Motion to Lift the Automatic Stay. These witnesses include property appraisal and valuation experts, Stephen Siegler and C. Matthew Crider.

Debtor's primary purpose in bringing the Opposition to Edgefield Holding's Motion and Debtor's Motion for Reconsideration was to answer the question of whether equity existed in the 1811 & 1815 Gervais Street property. The deficiency of Edgefield Holdings was pursued

against the Debtor's Wife, Michele Washington, regarding her personal assets. The deficiency permitted the lifting of the automatic stay protection initially afforded to Michele Washington and it was created by the bank's fraud upon the court.

V. TRIAL COURT ERRED IN GRANTING MOTION TO DISMISS ON THE

GROUNDS OF APPELLEE'S SUBJECT MATTER JURISDICTION ARGUMENT

The Appellee claims that the Appellants did not exhaust their administrative remedies with respect to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") and therefore the court does not have subject matter jurisdiction of claims regarding such. The Appellee thus argues for a dismissal of the complaint under Rule 12(b)(1), SCRCP. In a Rule 12(b)(1) motion, "the court may consider 'affidavits and other evidence outside the pleadings . . .' without converting the motion into one for summary judgment." Murphy v. Owens-Corning Fiberglas Corp., 346 S.C. 37, 43, 550 S.E.2d 589, 592 (Ct. App. 2001)(citing Baird v. Charleston County, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999)).

In this case, the Appellants in fact did purse administrative remedies through the FDIC, as noted in Exhibit 8 of the Complaint (pg. 272 of Exhibits attachment). During the Appellants' pursuit of remedies through the FDIC, the Appellee in fact argued that the Appellants could have and should have litigated any claims associated with violation of consumer protection laws within the courts. Now, the Appellee seeks to argue that the Appellants should have exhausted their administrative remedies through the FDIC process.

The attachments under Exhibit 8 note numerous letters of the Appellants attempting to exhaust their administrative remedies through the FDIC. After postulating that the Appellants should have utilized the courts to pursue claims under relevant provisions of the FDIC, the Appellees now postulate that the

Appellants should have done the opposite: utilized the administrative process of the FDIC.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court.

Respectfully submitted,

March 20, 2020

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy has been furnished to the following parties by U.S. Mail on March 20, 2020:

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